

The Unfulfilled Promise of Citizen Review

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Once controversial, the idea that citizens should participate in the administrative review of complaints about police conduct is today widely accepted. Citizen review processes of one type or another can be found in about eighty percent of our largest cities. There are approximately 100 separate oversight agencies in this country and that number has been growing steadily for some time.¹ Even as citizen review has become an accepted feature of the landscape in American policing, however, questions have been raised about just what citizen participation in complaint review is likely to achieve in terms of improving police and the relations between police and communities. “[T]here is a serious lack of research on the activities and effectiveness of oversight agencies,” wrote Samuel Walker, the most consistent academic observer of citizen review mechanisms, in 2001.² “The spread of citizen review,” he noted a few years earlier, “has not brought complete joy [to the people who advocated for it.] In fact, there is a pervasive uneasy feeling that citizen review is not the panacea many expected it to be.”³

As a commissioner on New York City’s Civilian Complaint Review Board (“CCRB”) from 1994 until the spring of 2003, I am very familiar with the mixed reviews that complaint agencies have often received. Thus, my own Board is said to have made “only incremental change” in its first ten years as an independent city agency, according to one columnist for *The New York Times*.⁴ The City’s Comptroller may have been more impressed after a recent audit; he took pains to note that New York’s citizens “can be assured that the CCRB is working diligently to ensure that complaints of police misconduct [are] handled responsibly.”⁵ The New York Civil Liberties Union (“NYCLU”), however, subsequently concluded that the Board “has proved to be largely ineffective.”⁶ “From the moment of their inception,” one commentator has observed, “review boards have met with only moderate success.”⁷ At least from the perspective of public perception, this is surely true in New York.

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¹ See SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 6 (2001).

² *Id.* at 184.

³ Samuel Walker, *Achieving Police Accountability*, in RESEARCH BRIEF 1998, at 2 (Ctr. on Crime, Communities, & Culture, Occasional Paper Series No. 3, 1998).

⁴ See Joyce Purnick, *Review Board Is No Longer a Hot Button*, N.Y. TIMES, July 14, 2003, at B1.

⁵ Press Release, William C. Thompson, Jr., New York City Comptroller, Follow-Up Audit Finds CCRB Case Management Markedly Improved (May 23, 2002) (on file with author).

⁶ Christopher Dunn & Donna Lieberman, *A Review Board in Name Only*, N.Y. TIMES, July 19, 2003, at A13.

⁷ Richard S. Jones, *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission*, 77 MARQ. L. REV. 505–06 (1994).

An amalgam of explanations could be and have been proffered, both for New York's experience, and for the larger phenomenon of mixed success with citizen review. Many of these explanations have their place in the history of the citizen review movement. Thus, there have undoubtedly been failures of leadership. Funding has certainly been inadequate in many places, and some complaint agencies have surely been granted less authority than necessary to do their jobs. In this Commentary, however, I propose to focus on a more general phenomenon: the limitations of the "rule enforcement" model that has characterized many complaint review agencies. It may be inevitable, as Professor Goldstein suggested some years ago, "that people who take an interest in police matters because they have suffered some abuse will concentrate on creating methods for controlling police behavior."⁸ Reformers err, however, in "placing so heavy a burden on control mechanisms as a way of solving long-standing problems in the police field," and in viewing control "almost exclusively in terms of identifying and taking action against wrongdoing."⁹ A narrow focus on the after-the-fact investigation of complaints for the purpose of holding individual officers accountable for misconduct, important as this task may sometimes be, has the effect of restricting the role that citizen complaint procedures might play in enhancing the quality and legitimacy of police services.

The Commentary proceeds in two parts. Part I explores the traditional, rule-enforcement approach to complaint review and the limitations of this approach as a vehicle for police reform. Part II considers what it might mean to adopt a more "problem-oriented" approach to complaint review. Both parts draw upon my experience as a Commissioner on New York City's CCRB.

I

The traditional argument for citizen review is based on the familiar premises of all general deterrence or "rule enforcement" models.¹⁰ The argument proceeds from the assumption that involving citizens in the complaint process will help ensure that complaints against police are treated properly—that they are investigated fairly and thoroughly, and more fairly and thoroughly than if handled solely by police. With better investigations, the theory goes, more complaints will be sustained, resulting in more discipline of officers who have committed acts of misconduct. More discipline in turn will lead to greater deterrence of police abuse, with resulting benefits to the police-community relationship and to the quality of policing itself.

This model is consistent with a variety of formal structures for citizen input into the complaint process. New York's CCRB is an independent, mayoral agency that has responsibility for investigating complaints brought against New York City Police Department ("NYPD") officers and alleging one of four types of police misconduct:

⁸ HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 159 (1977).

⁹ *Id.*

¹⁰ This account of the traditional argument draws upon the useful summary in Professor Walker's recent book. See WALKER, *supra* note 1, at 55–56.

wrongful use of force; abuse of authority; discourtesy; or use of offensive language (generally referring to slurs related to race, ethnicity, gender, sexual orientation, religion or disability).¹¹ Based on its investigations, the Board recommends discipline to the Police Commissioner.¹² The Board has a team of about 120 investigators who receive complaints and then interview relevant witnesses, including both the complainant and the involved officer.¹³ The CCRB has subpoena power and uses it to obtain documentation relevant to the disposition of claims, including accident reports, tape recordings of police radio communications and 911 calls, medical records, and stop and frisk reports.¹⁴ Case reports prepared by CCRB investigators are reviewed by Board members, sitting in panels of three, and become the basis for Board recommendations. These investigative reports are generally thorough; their quality has improved dramatically since the Board became an all-civilian, non-police review agency in 1993.¹⁵

Not even the most assiduous complaint investigation, however, can overcome a basic problem with the traditional argument for citizen review: namely, its focus on the retrospective investigation of complaints as a principal mechanism for rooting out officer malfeasance and enhancing the performance of police. In reality, complaint investigation is but a small piece of any comprehensive strategy aimed at improving policing and minimizing abuse. Indeed, complaint processes alone are inadequate even to identify, much less prevent, police misconduct.

There are several reasons for this. First, many people who feel aggrieved by police action do not file complaints—even in circumstances where the complaint mechanism is open and accessible to them. Indeed, certain serious police misconduct is unlikely to surface at all in a complaint-driven process. Many forms of corruption, for instance, like the receipt of bribes by police, generally involve no readily identifiable victim, and so are rarely reported or complained about. And even when misconduct involves identifiable victims, it often occurs in neighborhoods and among people least likely to generate formal complaints. Just consider the latest major police corruption scandal in New York City, in which 30th Precinct officers were found to be stealing drugs and money from narcotics dealers in crime-ridden neighborhoods, and at the same time brutalizing these drug dealers.¹⁶ This scandal came to light not

¹¹ See THE CITY OF NEW YORK, CIVILIAN COMPLAINT REVIEW BOARD, STATUS REPORT, Vol. IX, No. 1, at 4 (2001) [hereinafter CCRB 2001 MID-YEAR STATUS REPORT].

¹² With only a few exceptions, citizen review processes generally involve citizens making recommendations for the discipline of officers, rather than final determinations. Most scholars who have considered the subject have concluded that this limitation on the scope of citizen involvement is appropriate, lest the authority of the police chief and the chief's responsibility for officer performance be undermined in a way that could ultimately prove detrimental to accountability within the police department. See WALKER, *supra* note 1, at 75–76.

¹³ See CCRB 2001 MID-YEAR STATUS REPORT, *supra* note 11, at 5, 9.

¹⁴ See *id.* at 5.

¹⁵ See Kevin Flynn, *Police Consider Plan to Bolster Review Board*, N.Y. TIMES, Aug. 10, 1999, at A1.

¹⁶ See David Kocieniewski, “Dirty 30” Precinct: 12 of City’s “Finest” Accused of Outcrooking

because the victimized street dealers filed complaints, but as the result of a significantly more proactive sting in which a bodega operator believed to have information about police corruption was targeted, charged, and then persuaded to cooperate.¹⁷

Next come the limitations of retrospective investigation itself—limitations that are particularly severe in the context of complaints against police. The fact is that even the most aggressive complaint investigation will fail to resolve many complaints one way or another. Citizen complaints frequently involve one-on-one confrontations between an officer and a citizen. “[M]ost police encounters occur under isolated conditions . . . [and] even the giving of a traffic citation on a crowded street is often unobserved.”¹⁸ The accounts of an incident proffered by the participants in such incidents are often diametrically opposed: the citizen claims that he was rudely and gratuitously shoved by the officer at the conclusion of a traffic stop, while the officer states there was no physical contact; the citizen alleges that she was derided with a sexist slur, an allegation vehemently denied by the police officer who cited her for failing to pay the subway fare. In such circumstances, it is often impossible to determine the facts definitively, and many such complaints are therefore not sustained. Given this analysis, it is fairly clear that discipline for police misconduct is not imposed in some unknown (though possibly substantial) fraction of cases where misconduct has occurred, undercutting the assumed deterrent effect of after-the-fact review.

These problems are a function of any complaint procedure, whether it involves citizen participation or not. In fact, citizen review agencies have not necessarily substantiated more complaints than internal police review procedures; “low sustain rates appear to be a universal phenomenon common to all [such] procedures.”¹⁹ New York’s CCRB disposes of cases as “substantiated” when a preponderance of the evidence exists to believe that a subject officer has committed an act of misconduct.²⁰ It “exonerates” when an alleged act is found to have occurred but is deemed proper, and it “unfounds” the complaint when the act is determined not to have taken place. An “unsubstantiated” finding means the available evidence was insufficient to substantiate, exonerate, or unfound. The Board completed 2418 full investigations in 2000. Of these, only 189 (or about eight percent) involved at least one substantiated allegation. In about one third of the cases, the Board came to no affirmative finding one way or the other on any of the allegations in the complaint.²¹ And this does not

Crooks, *NEWSDAY*, Apr. 16, 1994, at A5.

¹⁷ *See id.*

¹⁸ GOLDSTEIN, *supra* note 8, at 161.

¹⁹ WALKER, *supra* note 1, at 120.

²⁰ *See* THE CITY OF NEW YORK, CIVILIAN COMPLAINT REVIEW BOARD, STATUS REPORT, Vol. VIII, No. 2, at 17 (2000) [hereinafter CCRB 2000 STATUS REPORT]. Some agencies use a “clear and convincing” standard, though the preponderance standard is preferred by most oversight advocates. *See* WALKER, *supra* note 1, at 74.

²¹ *See* CCRB 2000 STATUS REPORT, *supra* note 20, at 17.

even count the large number of cases (some 50%, in 2000) that are not even fully investigated because complainants could not be located, repeatedly failed to show up for scheduled appointments, or chose to withdraw their complaints.²²

All this is not to argue against the value of citizen participation in the complaint review process. One clear benefit that can be claimed for citizen review processes is that they make the complaint process more visible, often more accessible, and perhaps more legitimate, and thus they tend to receive more complaints.²³ Even if the sustain rate of complaints remains the same in a citizen-involved process, then, as opposed to a complaint process internal to the police department, the overall discipline rate may well be higher.²⁴ At the same time, the retrospective review of complaints cannot substitute for various forms of proactive investigation designed to identify and root out misconduct that may not be readily reported. Citizen review is certainly no substitute for “informed and sensitive police administration and training to influence police activities”²⁵—to prevent misconduct before it occurs.

But this need not undercut the traditional argument’s real (if partial) contribution to police reform—at least if the rule enforcement approach to complaint review poses no additional problems beyond its lack of comprehensiveness. Unfortunately, this is not the case. An even larger problem with this approach may be that its narrow focus on “holding officers to account” ends up distracting us from other important roles that complaints should play in improving police operations. As it turns out, the retrospective review of complaints for the purpose of holding individual officers responsible for misconduct is an important *aspect* of what complaint review is all about. Accountability in policing, however, may sometimes be better promoted by an approach to complaints that is less concerned with individual culpability and more concerned with using complaints to enhance police performance.

Consider the hypothetical complaint of a woman whose home was invaded by police and whose belongings were ransacked pursuant to the legal authorization afforded by a no-knock search warrant. (Not that this complaint is all that hypothetical. About three percent of CCRB’s complaints involve the execution of warrants.²⁶) The individual officers who broke into this woman’s home had both probable cause to believe that evidence would be found and reason to fear that it might be destroyed if they announced their presence before entering. The information on which they relied, however, proved to be in error. No drug lab was found in the woman’s home, but merely a family—a family whose members were left angry and fearful as a result of the officers’ intrusion.

Assuming that the officers acted with no unnecessary violence or disrespect,

²² New York’s CCRB closed 4979 complaints in 2000. Of these, almost 2500 were “truncated”—meaning that they were not fully investigated for reasons like the ones stated in the text. *See id.* at 17–18.

²³ *See WALKER, supra* note 1, at 123.

²⁴ *See id.*

²⁵ JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW* 230 (1993).

²⁶ *See* Melanie Lefkowitz, *New Database on Way for Search Warrants*, *NEWSDAY*, May 28, 2003, at A5.

discipline in such a case would be inappropriate: no “rules” were broken and punishment of the individual officers (who, after all, were doing their jobs as directed by their superiors) would be unfair. Repeated complaints of this type, however, could reflect serious problems in a police department: inadequate managerial controls over the use of confidential informants or decisions whether to seek warrants; inattention to the community costs of an aggressive anti-drug campaign employing tactics of this sort; lack of a mechanism to redress police investigative errors. At any rate, the complainant is unlikely to be satisfied by what would be the “correct” disposition of her case from a rule enforcement perspective—namely, a judgment exonerating the police personnel. The information in the complaint, moreover, has not been treated adequately if it has not been used by police managers to address any underlying problems of the type suggested here.

The hypothetical goes to a larger point. Given the dispersed nature of patrol work and the relatively limited opportunities for intensive on-scene observation by supervisors, complaints are a particularly valuable source of management information in policing.²⁷ We know this already with regard to problem officers. A relatively small percentage of officers in many departments amass a disproportionate share of citizen complaints, as well as use-of-force reports, and other indicia of adversarial citizen encounters.²⁸ Good police supervisors use information of this type to determine whether there is a need for retraining, counseling, or reassignment in a given case—and often well before any complaint is ever substantiated, or discipline is imposed. For this reason, citizen complaints constitute an important part of the data included in early warning systems.²⁹

But the information in citizen complaints has uses that go well beyond even the important task of identifying at-risk officers and intervening with them before serious problems develop. Indeed, the close examination of complaints can shed light on a broad range of matters: like oversights in training that are producing cases in which force is unnecessarily, but not maliciously, used; recurrent supervisory lapses of the sort that set the stage for serious problems down the line; or even simple inattention to duty by officers on patrol.

Consider an example. In 2001, New York’s CCRB did a study of complaints involving street stops. The report found, among other things, that in over half of the hundreds of fully investigated complaints involving the street stop of an individual that formed the principal data for the study’s findings, the officer or officers involved failed to fill out a form required by the Police Department for such encounters.³⁰ Now, the CCRB’s jurisdiction does not extend to the failure to fill out internal NYPD forms, and this finding emerged only as a result of the study. But this example

²⁷ See SKOLNICK & FYFE, *supra* note 25, at 231.

²⁸ See Walker, *supra* note 3, at 7.

²⁹ See *id.*

³⁰ See CIVILIAN COMPLAINT REVIEW BOARD, STREET STOP ENCOUNTER REPORT: AN ANALYSIS OF CCRB COMPLAINTS RESULTING FROM THE NEW YORK POLICE DEPARTMENT’S “STOP AND FRISK” PRACTICES 44 (2001).

demonstrates how analysis of the information in complaints can shed light on broader police management issues: in this instance, widespread noncompliance with an organizational policy facilitating managerial control over the stop-and-frisk practices of police.

There is something of an irony here. The citizen review movement began in the perception that internal police complaint review procedures (such as they were) were too often properly faulted “for lax and incomplete investigations, for a low rate of substantiation of complaints, and for failure to inform the public of the reasons for the results of complaints.”³¹ These problems were real, and have been ameliorated in many places by the institution of citizen review. (As Professor Chevigny has put it, we can at least hope that in citizen review processes, unlike some police-dominated ones, participants will refrain from “intimidat[ing] complainants and throw[ing] away complaints.”³²) The move to independent, all-civilian review agencies like CCRB, however, may make it harder, not easier, for the *management* information in complaints to be effectively employed. Complaints are investigated outside the day-to-day operations of the NYPD by personnel who may be more objective and dispassionate when it comes to holding individual officers to account, but who are also almost certainly less expert in recognizing and evaluating police management issues.

Add to this the additional complication that the culpability-focused response to complaints tends to repress candid discussion within the police organization about the circumstances producing them. This may stymie opportunities for collegial exchange among police—the sort of exchange in which officers might consider alternatives to the actions which resulted in a complaint, might learn from the experience of others, and might thus better their practices. The significance of such learning within the police organization should not be blithely discounted. Indeed, some experts justifiably view it as essential to minimizing use of force.³³ After all, the instances in which the force used by a well-meaning officer was simply unnecessary far outnumber those instances of overly aggressive officers using force in brutal and unlawful ways.³⁴

The bad effects of repressing candid discussion about complaints among police, moreover, extend beyond the missed opportunities for learning within the police organization. There is also outright lying to be taken into account. Consider the admission of one officer in a focus group that he would probably falsify statements in a CCRB investigation involving the use of force, even if he believed his actions were completely justified:

³¹ PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 91 (1995).

³² *Id.* at 95.

³³ See, e.g., Carl B. Klockars, *A Theory of Excessive Force and Its Control*, in *AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE* 11, 29 (William A. Geller & Hans Toch eds., 1995).

³⁴ See James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, in *VIOLENT TRANSACTIONS* 207, 210 (Anne Campbell & John J. Gibbs eds., 1986).

Police Officer: This is where the problem comes in. Because now I want to tell them basically exactly what happened. I struggled with this guy and I had to bash his head into the wall because that's the only way I could subdue him. Now they're going to say, "Why didn't you use your mace?"

Interviewer: Are you going to tell them what you just told us?

Police Officer: I'd be very leery. Probably not.

Interviewer: Why not?

Police Officer: Because you're afraid You're wrong once you walk in the door.³⁵

We cannot condone such conduct, but it is important to understand the context in which it occurs. Many citizen complaints do not involve the alleged violation of one or another bright-line rule, but instead implicate standards of reasonableness—standards that derive much of their meaning from circumstance that cannot be fully articulated outside their invocation on a case-by-case basis, and that as a result do not generate clear boundaries between appropriate and inappropriate conduct in many cases. Charged with the inappropriate use of force or strong language (both of which police are permitted in appropriate circumstances to employ), an officer who has used force or uttered profanity may well lack confidence that his behavior will be exonerated, even if he believes he acted properly under the circumstances. Board members at CCRB have thus not infrequently confronted the question whether to exonerate conduct that is denied by the officer. They have also wrestled with the more general problem how to handle false statements by police.

The immediate response is to redouble efforts at holding lying officers to account. This response is understandable, but the reality is that the review process is not likely to do significantly better at identifying false statements about one-on-one encounters than it does in substantiating the underlying misconduct in such encounters when it occurs.

Let me be clear. The thrust of these observations is not to argue against the existence of a complaint review procedure that is focused on discipline to a significant degree. Indeed, "[c]ontinued compliance with formal policies depends on the enforcement of meaningful discipline," as Professor Walker has put it, and complaints still represent one of the better sources of information about malfeasance by police.³⁶

³⁵ Michele Sviridoff & Jerome E. McElroy, Vera Institute of Justice, *The Processing of Complaints Against Police in New York City: The Perceptions and Attitudes of Line Officers* 19 (1989) (unpublished manuscript, on file with the author).

³⁶ SAMUEL WALKER, *TAMING THE SYSTEM* 32 (1993).

This may be particularly true with regard to the sort of low-level misconduct—verbal abuse, for instance, or minor, but improper use of force—that can foreshadow greater problems to come, but that is unlikely to result in civil litigation or criminal investigation.

At the same time, the corrosive effects of false statements on police integrity must be considered a cost of the punishment-oriented, rule enforcement approach to citizen complaints—a cost that should be considered in deciding upon the appropriate jurisdiction of complaint review processes focused on investigating complaints for the purpose of holding officers to account. The police officer who calls a citizen a “jerk” (no matter how sorely provoked) has probably violated a professional norm of courtesy, though even the most laborious investigation may find this difficult to prove. The same officer who falsely denies the charge, however, and who enlists his partner to corroborate his false account, has now not simply proved discourteous on at least one occasion. He has also become a liar and a co-conspirator, reinforcing patterns of deviance and insularity within the police organization.

II

So where does all this lead? Whatever its merits, the traditional rule enforcement approach to citizen review imposes costs and fails to maximize the return to be gleaned from citizen complaints. Simply put, citizen review mechanisms need to transcend the limitations of the traditional approach in order to realize the full value of citizen participation in complaint review. As it turns out, some portion of complaints *are* best treated in “rule enforcement” terms: as presenting allegations to be investigated, with an eye to punishing those rule violations that can be shown. Many complaints, however, should be treated differently: as shedding light on problems that may lend themselves to a rule enforcement process, but that might also require additional or altogether different forms of intervention and response.

In this way, citizen complaint review processes need to take a lesson from the pagebook of problem-oriented policing.³⁷ This policing theory critiques the traditional approach to policing, which defines the police mission as enforcement of the criminal law in response to isolated, individual events. It stresses, instead, that policing involves handling a wide variety of problems. Police can and should use a range of methods in dealing with these problems, with law enforcement being one method that will sometimes, but not always, prove effective.³⁸ Just as police in this framework abandon the notion that criminal law enforcement completely defines their role, participants in citizen complaint review processes should view rule enforcement as only one, rather than the sole, appropriate response to the problems presented in complaints.

Different communities with different schemes for involving citizens in complaint review can and should vary in their approaches to the institutionalization of a more

³⁷ See HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* 32–49 (1990).

³⁸ See *id.* at 11.

problem-focused complaint review system. A problem-oriented approach, however, involves four general characteristics.

1. *Triage*. — Not all complaints should be treated alike. In most cases, the lodging of a complaint at agencies like CCRB begins a largely “one size fits all” process to determine whether particular conduct violated some norm—against the use of excessive force, offensive language, discourtesy, or the like. Taking a more problem-oriented approach to complaints, citizen review agencies should retain the rule enforcement process for many cases, but should clearly reject the underlying practice of treating *all* complaints the same.

Cases involving more serious misconduct (or more serious offenders) should be referred to seasoned investigators for aggressive treatment—more aggressive treatment than is currently available in the investigative processes that characterize many citizen review agencies. As already suggested, the citizen review agency may be the only forum where an individual can realistically seek redress for a single kick, a punch, or even a black eye.³⁹ The successful investigation of such allegations is thus extremely important and, in appropriate cases, may result in the termination of officers who might otherwise have gone on to cause yet more serious harm. Citizen review agencies, however, may fail to pursue these serious cases seriously enough because they do not distinguish them from others.

On the other hand (and more controversially, within the current operations of agencies like CCRB), many citizen complaints involve neither serious offenses nor serious offenders, but simple rudeness, insensitivity, name calling, or minor force.⁴⁰ Some of these cases should be treated in rule enforcement terms, particularly if problem officers are involved. Others, however, are appropriate for alternative disposition: mediation, for instance, or referral to police supervisors for less formal investigation or the instruction of involved officers.

The development of alternative disposition processes for cases involving discourtesy, in particular, is desirable. On average, twenty-five percent of the allegations at CCRB charge discourtesy—alleged misconduct often arising from just the sort of one-on-one encounter that poses the most difficult obstacles for investigators trying to reassemble a definitive story after the fact.⁴¹ Not infrequently, moreover, discourtesy cases also involve no clear misconduct, even taking as true everything that a complainant contends. Instead, such complaints implicate the different perspectives that citizens and police bring to their encounters.

Just what does this mean? For the citizen, the events leading up to a first-time call to police may have been quite traumatic, leaving him or her in a state of semi-shock. This is not likely true for the officer:

³⁹ See *supra* text accompanying note 36.

⁴⁰ See WALKER, *supra* note 1, at 141.

⁴¹ See CCRB 2001 MID-YEAR STATUS REPORT, *supra* note 11, at 14.

At the start of his career, an officer may respond with some urgency to such incidents as a family squabble, a traffic accident, a typical home burglary, or a drunk causing a disturbance. But after handling a hundred domestic disturbances, a hundred accidents, a hundred burglaries, or a hundred drunks, the officer understandably may not display the same degree of concern and inquisitiveness⁴²

This is not to excuse abruptness or insensitivity on the part of police. Rather, it is to note of an opportunity for an approach to complaints that might address the immediate rupture between citizen and officer, and also facilitate learning by police.

CCRB has experimented with a small mediation program as an alternative to the complaint investigation process that dominates its process. In this procedure, the complainant and the officer “agree to meet face to face with an independent mediator present, discuss the incident that gave rise to the complaint, and attempt to reach some mutual understanding.”⁴³ All discourtesy and offensive language allegations are “mediable,” as are many abuse-of-authority and even force allegations, so long as the force alleged is minor and produces no injury.⁴⁴ Mediation is not open to officers who have a lengthy record of complaints and cannot be resorted to more than once every nine months by an individual officer.⁴⁵ Even so, about thirty-two percent of the agency’s caseload fits within its parameters for mediation.⁴⁶

One recent case was reported by Vivian Berger, a colleague at Columbia and one of the mediators involved in the program. The case began when officers roused a family at 6:00 a.m., seeking to arrest the teen-age daughter’s ex-boyfriend, who was not present in the apartment. The mother became enraged when an officer would not let her fully close the door while her daughter, clad in a t-shirt, put on some clothes. The officer, for safety reasons, insisted on putting his foot in the door:

Intense discussion led the parties to appreciate the inherent conflict between the officers’ need to maintain control over the situation and the mother’s “need” to protect her daughter’s modesty. Somewhat mollified, the mother agreed to drop the charges; the officers, for their part, recognized that her outburst had not been willfully obstructive and regretted that they had lost their tempers.⁴⁷

⁴² GOLDSTEIN, *supra* note 8, at 161–62.

⁴³ WALKER, *supra* note 1, at 80.

⁴⁴ See THE CITY OF NEW YORK, CIVILIAN COMPLAINT REVIEW BOARD, STATUS REPORT, Vol. X, No. 2, at 7 (2002) [hereinafter CCRB 2002 STATUS REPORT].

⁴⁵ See *id.*

⁴⁶ Conversation with Florence Finkle, CCRB Executive Director (Feb. 6, 2004).

⁴⁷ Vivian Berger, *Defuse “Cops vs. Citizens”*, NAT’L L.J., May 24, 1999, at A17.

Berger's fact pattern cries out for treatment outside a culpability-focused, punishment-oriented regime. Sadly, however, alternative disposition programs like mediation, because they are "out of step with the highly polarized nature of citizen complaints in the United States and the traditional adversarial, legalistic style of complaint procedures," are hard to get off the ground.⁴⁸ In 2002, the CCRB successfully mediated only seventy-three citizen complaints.⁴⁹ The agency has struggled to define the category of complaints that will be deemed "mediable," and sometimes under attack from advocacy groups like the New York Civil Liberties Union, which tends to insist on the primacy of culpability-focused approaches to citizen review.⁵⁰

Whatever the views of the NYCLU, there is evidence to suggest that complainants themselves might welcome the development of alternatives to the traditional investigative process. In one study conducted by the Vera Institute, complainants to New York City's CCRB (at a time when the agency was still internal to the Police Department, though staffed in part by civilian personnel) were asked about their goals. Only twenty percent wanted to see the involved officer or officers punished. The majority, sixty-one percent, wished to see the officer reprimanded or spoken to, while nineteen percent simply wanted the incident reported.⁵¹ Notably, some sixty-four percent of the complainants were not satisfied with their experience with citizen review and most believed the process was biased against them.⁵² Significantly, moreover, complainants' dissatisfaction with CCRB rose *the further they pursued their complaints*—with eighty-four percent of those who had their complaints fully investigated expressing dissatisfaction with the complaint review procedure.⁵³

There is again an irony here. Historically speaking, it is not surprising that reformers who had seen serious complaints ignored by police advocated for a process that would treat complaints seriously—that would thoroughly investigate them, subject them to impartial decision makers, and secure punishment where misconduct had occurred. This process, however, is ill-suited to many complaints and is ultimately detrimental to the efforts of citizen review agencies to use these complaints to improve police performance. This is not simply because determinate outcomes are difficult to reach in the one-on-one situations that produce these complaints (though this is a serious problem). For some complaints, it may simply be more important that citizens have their perspectives acknowledged and that police learn

⁴⁸ WALKER, *supra* note 1, at 80.

⁴⁹ See CCRB 2002 STATUS REPORT, *supra* note 44, at 7.

⁵⁰ See, e.g., NEW YORK CIVIL LIBERTIES UNION, A SEVENTH ANNIVERSARY OVERVIEW OF THE CIVILIAN COMPLAINT REVIEW BOARD, JULY 5, 1993–JULY 5, 2000, 18–32 (2002).

⁵¹ See Michele Sviridoff & Jerome E. McElroy, Vera Institute of Justice, *Processing Complaints Against Police in New York City: The Complainant's Perspective* 27–30 (1989) (unpublished manuscript, on file with the author).

⁵² See *id.* at 47, 106.

⁵³ See *id.* at 50.

from the experience. But this requires rejecting the "one size fits all" approach.

2. Information Gathering and Analysis. — The next point flows from the insight that complaints represent an important but underutilized management tool for police. Participants in citizen review processes need to recognize that the most powerful argument for citizen review may not involve holding individual officers to account (however essential this task may sometimes be). The real need for citizen participation in complaint review may stem instead from the shortsightedness of police managers who often conclude that complaints are unimportant "because most of them [are] not sustained."⁵⁴ Complaints should be treated seriously as containing information vital to the effective management of the police organization and to its accountability to the community at large. Part of the citizen review agency's task is to make this apparent to police managers—to advocate for effective use of the information in complaints.

Several implications flow immediately from this point. First, citizen review mechanisms should be visible to the community. If complaints contain valuable information that can be used to improve policing, people in the community should know how and where to register their complaints. Next, for all complaints (including those referred for alternative disposition or otherwise not fully investigated) a statement should be obtained from the complainant, so that the substance of the complaint and its context are understood. Indeed, one powerful argument for developing alternative disposition processes for *some* complaints is that this step may free up resources to better gather and analyze the information contained in *all* complaints, furthering the broader project of accountability.

Finally, the information gathered about a complaint should be maintained in an accessible form that permits its to be used in detecting and evaluating any patterns of problematic behavior that may emerge. Complaints can shed light on problem officers, problem squads, or problem precincts. Whatever their disposition, they can illuminate "patterns of conduct, such as particular types of questionable searches . . . or a concentration of complaints of force in a single neighborhood."⁵⁵ Say there is a concern about the late night shift in a particular precinct. Can we pull up the complaints received by everyone who has worked that shift for the last five years? Some of those complaints were not fully investigated at the time, because the complainants opted not to pursue them. Did citizen review personnel solicit and maintain a reasonable amount of information from the complainants during their initial contacts?

All this requires the managers of citizen review processes carefully to implement systems for data gathering, analysis, and sharing, both with regard to misconduct and other police management issues. The immediate goal is to spot problems: to recognize the flurry of no-knock warrants executed at the homes of citizens uninvolved in crime; to note the apparent ineffectiveness of the police department's

⁵⁴ CHEVIGNY, *supra* note 31, at 96.

⁵⁵ *Id.* at 97.

early intervention with an at-risk officer who continues to garner complaints. The broader goal is to have in place a process that regularly and systematically distills from complaints all the relevant information they contain about issues of importance to improving police operations and the relation between communities and police.

Finally, there should be some mechanism for citizens involved in complaint review to bring issues to the attention of police managers: the people who are often best positioned to evaluate complaint patterns. This is not to shortchange the responsibility of citizen review participants publicly to report on issues of concern. But complaint evaluation should also be built into the everyday work of police management so that problems can be addressed before they have erupted into serious concerns.

Consider, in this regard, the NYPD's legendary COMPSTAT program, in which precinct commanders are called to headquarters so that precinct crime trends can be reviewed, "using state-of-the-art computer mapping techniques able to pinpoint crimes down to the block level."⁵⁶ The close review of complaint information should be a regular feature of such managerial processes, so that attention is focused on the contexts that give rise to complaints and so that supervisors are called to account for their occurrence.⁵⁷ Police managers may correctly contend that an increase in complaints from a given neighborhood is the result of increased enforcement in that neighborhood that is broadly acceptable, even though it produces more citizen complaints. The citizen review process has still played an important role by flagging the increase and prompting the police department to examine the reasons for a concentration of complaint activity.

3. *The Involvement of Line Supervision.* — This leads to the next point. Citizen review procedures should not be isolated from the processes by which supervisors monitor their officers' conduct and are held accountable for officer performance. As Professor Bayley has argued, "[T]he art of achieving accountability . . . is to enlist the support of police in disciplinary activities."⁵⁸ Taking full account of the need for confidentiality in certain circumstances, or at certain points in a complaint investigation, police supervisors should not be left unaware of the specifics of instances in which their officers have used force, searched private places, or engaged in any of the other numerous activities that can generate citizen complaints. Indeed, supervisors might ideally be held accountable for assessing their officers' conduct, perhaps by requiring that they conduct investigations into some complaints, "complete with detailed 'findings and recommendations' about whether officers' behavior was

⁵⁶ Robert C. Davis & Pedro Mateu-Gelabert, Vera Institute of Justice, *Respectful and Effective Policing: Two Examples in the South Bronx* 1 (1999) (unpublished manuscript, on file with the author).

⁵⁷ NYPD managers do review some complaint data in COMPSTAT meetings, but the Police Department has not invited CCRB personnel to participate, or to draw upon the fuller information about complaints that is contained in CCRB's investigative files.

⁵⁸ David H. Bayley, *Accountability and Control of Police: Lessons for Britain*, in *POLICING* II 439, 451 (Robert Reiner ed., 1996).

appropriate, and how such incidents fitted into the context of officers' career histories."⁵⁹ Citizen participation in the complaint review process guards against the dangers that such investigations might be partial. As Professors Skolnick and Fyfe argue, supervisor participation militates against another concern: that supervisors detached from complaint procedures "are given opportunities to plead ignorance about their officers' most sensitive and controversial activities."⁶⁰

There is evidence that when supervisors pay attention to complaints, they can improve police performance. In New York City, for instance, in 1994, when the NYPD began employing new order maintenance techniques that many at least associate with the City's serious crime decline, citizen complaints rose dramatically, remaining forty percent above the 1993 level in 1998.⁶¹ These two trends—crime going down while citizen complaints went up—"led many to speculate that the inevitable price of the dramatic drop in crime [was] an aggressive police force that generate[d] more anger and resentment."⁶² The Vera Institute of Justice, however, has concluded otherwise, based on a study that it conducted of two troubled neighborhoods in the South Bronx in which police commanders during this same time period "[were] able to reduce complaints against their officers below 1993 levels while experiencing the same dramatic decline in crime characteristic of the city as a whole."⁶³

These precinct commanders made clear to those in their charge that they considered citizen complaints a high priority. They used a variety of mechanisms to deal with problematic behavior: pairing younger officers with attitude problems with older officers; attaching real consequences (like reassignment) to citizen complaints; and speaking personally with officers on the recidivist list each time they received a new complaint.⁶⁴ Academy training in respectful policing was reinforced by additional training at the precinct level. "Both commanders not only managed their officers well, but also managed community relations in a way that demonstrated that the police were responsive to community concerns."⁶⁵

The citizens involved in citizen review agencies cannot take over management of the police. They *can* play a role in seeing that the information in complaints is available in a useful form. They can point to trends and argue for attention to the signals that complaints can send. Just as importantly, they can press for the accountability of supervisors—seeking ways further to ensure that those best positioned to affect the behavior of officers are well aware of their responsibility for attending to the information in complaints.

⁵⁹ SKOLNICK & FYFE, *supra* note 25, at 234.

⁶⁰ *Id.*

⁶¹ See Davis & Mateu-Gelabert, *supra* note 56, at "Executive Summary".

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *id.* at 13–14.

⁶⁵ *Id.* at 15.

4. *Monitoring the Complaint Review Process.* — Finally, citizen review processes should themselves be accountable. Auditing of the complaint receipt and response process is important, as is the development of venues and standards for comparing results with and learning from the success stories of other places. Personnel in citizen review processes should develop mechanisms for testing the integrity and effectiveness of both the investigative process and less formal complaint review processes that are implemented. Systems for data gathering and analysis should be periodically reassessed, as should the process by which complaint patterns are noted and brought to the attention of police managers and the community at large.

Monitoring the complaint intake process is vital. Depending on how this process is organized, this may be partly about ensuring that police precincts properly receive complaints: “When the question of whether to accept a complaint is left to the discretion of [police] supervisors and officers, they come under enormous pressure to get rid of would-be complainants without formally recording their grievances.”⁶⁶ It may also involve auditing the independent review agency’s own performance, however, to ensure that complaints are courteously received and properly processed. “[I]n cities where complaints can be received at either the police department or the oversight agency (and in some cities, other public agencies), a properly designed evaluation strategy can determine which office provides the most open and receptive response.”⁶⁷

The need for effective audit procedures is particularly important given the recommendation, here, that discretion be exercised in the processing of complaints. The “one size fits all” approach has numerous disadvantages but at least superficially addresses the concern that serious complaints not be mishandled as posing less serious concerns. Assuming an adequate record keeping system and a process for monitoring compliance, however, a complaint review system relying on less formal processes for *some* complaints might, in the end, do better at capturing information about officers’ street-level conduct. This is because many complainants will simply not participate in a full-blown investigative process. In the absence of any alternatives, their complaints contribute to the number of truncated cases in which officers may remain unidentified or a full account of the complainant’s grievance may never be obtained.

We should be particularly scrupulous about affording both complainants and police “an opportunity to provide feedback on their experience.”⁶⁸ This is in part because participants in the complaint review process can themselves be among its most effective monitors. But the importance of this aspect of monitoring has other dimensions as well. There is a substantial amount of social science research that indicates that “encouraging and maintaining public trust in the character and motives of legal authorities” is an important way of ensuring that citizens want to abide by the law and want to cooperate with police and other law enforcement agencies.⁶⁹ It takes

⁶⁶ SKOLNICK & FYFE, *supra* note 25, at 232.

⁶⁷ WALKER, *supra* note 1, at 128.

⁶⁸ *Id.* at 164.

⁶⁹ Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L.

no great extrapolation from this work to argue that the manner in which complainants and police officers are treated within a complaint review process is important—important for their view of police and the broader legal system and, ultimately, for their trust in these institutions.

Complainants need to understand, as they participate in the process, that their side of the story is being heard. They need to understand the limitations of fact finding; they certainly should be aware that even if their individual complaints are not substantiated, they have made a record which in itself is a valuable contribution to better policing. On the other side, police should perceive that the process is thorough—even aggressive—but fair. And citizen review agencies should afford both police and complainants timely resolution of their complaints—an important point given that the failure of such agencies to dispose of complaints in a timely manner has been “a pervasive problem across the country.”⁷⁰

CONCLUSION

Citizen review agencies have much to gain from moving beyond the rule enforcement approach that has dominated their procedures. But there is an irony to the argument here. Distrust of internal review mechanisms and concerns about their integrity sparked the citizen review movement. This same distrust of police involvement manifested itself in the organization of many complaint review agencies. Much of what is proposed here requires that participants in the citizen review process work more closely with police to see that the information contained in complaints is effectively used to better the police organization and enhance police services.

Can the citizens in citizen review processes maintain their independence (and be perceived as independent) in light of this closer collaboration? Lurking in the answer is a larger question concerning how citizen review processes should be judged. Is it their role simply to help legitimate the complaint review process by providing for the participation of citizens? Or is it to be expected they will more broadly help improve the quality of police services by ensuring that the problems in complaints and the information they contain are properly attended to within the police organization?

This Commentary has argued that in this second generation of the citizen review movement, citizens can and should assume this larger role. This argument proceeds from a simple intuition: that in the long run, the legitimacy of citizen complaint review mechanisms will turn, not on the mere inclusion of citizens in the complaint review process, but in the improvements to policing that this helps to bring about.

REV. 361, 362 (2001).

⁷⁰ Walker, *supra* note 3, at 10. In 2000, New York’s CCRB took an average of 315 days to complete an investigation—a figure that is alarmingly high in an administrative regime where an 18-month statute of limitations constrains the time in which police officers may be subject to administrative discipline, at least for conduct that does not constitute a crime. See CCRB 2000 STATUS REPORT, *supra* note 20, at ix.

